

No. 76-1117

Supreme Court, U. S.
FILED
MAY 17 1976

MICHAEL RUDIN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARCHIE PELTZMAN, PETITIONER

v.

IRVING R. KAUFMAN, CHIEF JUDGE OF THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

*ON MOTION FOR LEAVE TO FILE A PETITION
FOR A WRIT OF MANDAMUS AND ON PETITION FOR
A WRIT OF MANDAMUS*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks mandamus against Irving R. Kaufman, Chief Judge of the United States Court of Appeals for the Second Circuit, in connection with a letter from an individual in the office of the *pro se* law clerk for that circuit (see Pet. App. A) indicating that an appeal brought by petitioner would not be docketed unless he paid a docketing fee or filed a motion for leave to proceed in forma pauperis. Petitioner claims that he qualifies for a waiver of the docketing fee under 28 U.S.C. 1916, which provides that

"[i]n all courts of the United States, seamen may institute and prosecute suits and appeals * * * for wages * * * without prepaying fees or costs * * *."¹

As the attached letter and docket sheet show (Apps. A and B, *infra*), there was an error in the handling of petitioner's appeal that now has been corrected. The determination whether petitioner's appeal arises under 28 U.S.C. 1916 should be made by the court of appeals. Here no such determination was made because the individual in the *pro se* law clerk's office who wrote petitioner informing him that the appeal would not be docketed was unaware that the appeal might properly be viewed as arising under that statute (App. A, *infra*). Petitioner has been informed of the mistake (*ibid.*) and his papers have been docketed as a motion for leave to proceed under 28 U.S.C. 1916 (App. B, *infra*). That motion will be decided by the court of appeals in due course.

¹Petitioner's appeal stems from a suit he earlier had brought in federal district court against his former employer, Central Gulf Lines, Inc., a steamship company (the United States was not a party to the suit). Petitioner claimed that Central Gulf Lines had unlawfully acceded to a union request that petitioner be discharged for failing to pay a \$2,000 union initiation fee. The district court granted summary judgment against petitioner, but the court of appeals remanded to the district court for consideration of whether the fee was uniformly demanded from those in petitioner's position and whether petitioner had in fact been a member of the union at the time of his discharge. *Peltzman v. Central Gulf Lines, Inc.*, 497 F. 2d 332 (C.A. 2).

On remand, the district court determined after a hearing that the steamship company was entitled upon the undisputed facts to dismissal of the complaint as a matter of law. Petitioner again appealed and the court of appeals affirmed. *Peltzman v. Central Gulf Lines, Inc.*, 523 F. 2d 96, certiorari denied, 423 U.S. 1074, rehearing denied, 424 U.S. 979.

On November 23, 1976, a year after the final order of the district court, petitioner filed a motion under Rule 60(b), Fed. R. Civ. P. The motion was denied, and petitioner then filed the notice of appeal that is the subject of the instant petition.

Under these circumstances, there is no need for the extraordinary relief that petitioner seeks in this Court. The letter informing him that the appeal would not be docketed effectively has been withdrawn. The matter presently is pending before the court of appeals.²

It therefore is respectfully submitted that the motion for leave to file a petition for a writ of mandamus should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

²If the court grants the motion, the appeal will go forward without payment of the fee. If the motion is denied, petitioner may be able to proceed by paying the \$50 fee or, if the appeal is dismissed with prejudice, he may seek review in this Court by filing a petition for a writ of certiorari.

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK 10007

A. DANIEL FUSARO
CLERK

May 4, 1977

Mr. Archie Peltzman
c/o Eve Katz
2428 W. 16th Street
Brooklyn, N.Y. 11214

Dear Mr. Peltzman,

On behalf of this office, I would like to apologize for the improper treatment which your request to proceed under the Jones Act (28 U.S.C. §1916) received. I would also like to explain the unfortunate sequence of events and tell you what has been done to rectify the mistake.

When you filed papers with this Court urging reversal of Judge Knapp's denial of your Rule 60(b) motion, it was the first time in the history of your litigation with Central Gulf Lines, Inc. that you requested leave to proceed under the Jones Act. The only connection Ms. Valentine previously had with §1916, as well as the fact your previous appeals had not proceeded under §1916, led her to conclude that you were not now entitled to so proceed. Without consulting the *pro se* law clerks or any member of this Court, Ms. Valentine sent you the January 17, 1977 letter informing you that you either had to pay the \$50 docketing fee or move for leave to proceed in forma pauperis.

Ms. Valentine did not realize the §1916 also covers some seamen's suits that arise out of wage disputes. Whether

your claim against Central Gulf is one of those suits is a question for this Court to determine. It may turn out that your action is not encompassed by §1916, but again, the Court should make that determination. You have presented at least a colorable claim under §1916 and it is our intention to have the Court resolve the question. To that end, we are construing the papers you attempted to file as follows:

"Leave to proceed under §1916 without prejudice to the paying of the \$50 docketing fee should §1916 relief be denied."

The motion will be submitted to the Court within the next two weeks. Should the Court grant you leave to proceed under §1916, a scheduling order will issue, and you may simply submit your "summary reversal" papers as your brief. If the Court should deny §1916 relief, you may then pay the \$50 docketing fee and a scheduling order will issue. (Ordinarily, you could move for leave to proceed in forma pauperis if §1916 relief were denied, but you indicated that your financial situation would not warrant consideration for forma pauperis relief.)

I hope this clears the way for your appeal. If you have any questions, don't hesitate to call this office.

Again, I am sorry for the delay you have experienced in trying to perfect your appeal. Please understand that the mistake was inadvertent, and, we hope, quickly corrected.

Sincerely yours,

S/ Deborah Hazen

Deborah Hazen
pro se clerk

APPENDIX B
GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-8201
T-6853

DATE	FILINGS - PROCEEDINGS
12-14-76	Filed copies of docket entries and notice of appeal
12-14-76	Archie Peltzman, Pro Se filed form C
12-14-76	Archie Peltzman, Pro se filed form D
12-20-76	Filed affidavit of service for Forms C and D, appellant
12-30-76	Received record (original papers of district court)
1-17-77	Received motion for summary reversal of the decision denying appellant motion to vacate, etc., p/s
4-18-77	Received supplemental record (original papers of district court)
5-4-77	Filed motion for leave to proceed under §1916 (the Jones Act) without prejudice to the paying of the \$50.00 docket fee should 1916 relief be denied (in connection to appeal from denial of a RULE 60(b) motion)